Constitution-making, federalism and direct democracy in the case of Cyprus: A comparative framework

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Constitution-making, constitutional conventions and conflict resolution: lesson drawing for Cyprus

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Introduction

This paper is concerned with the analysis of the proposal for a constitutional convention for Cyprus[1] as a potential conflict resolution mechanism. Like many concepts in the social sciences, the concept of a constitutional convention is a fuzzy construct. Despite this, we argue that the concept can still serve as useful analytical heuristic for examining a variety of constitution-making options that are pertinent to the conflict. In putting forward our argument we shall devote most of our attention to what we call the operational procedures of constitution-making—one of which is a constitutional convention. In addition, we shall take an expansive view of a constitutional convention that is concerned with *inter alia* implementing a new or modified constitutional regime. However, we shall also mention cases of constitutional transformation where the convention process has been specifically avoided. This will help us to establish analytical boundaries to the convention method. To aid us in our analytical efforts we will draw on the discipline of comparative politics to examine varying procedural mechanisms that have been used at foundational or transformational constitutional moments, many of which have resulted in power-sharing arrangements as mechanisms of conflict resolution in divided societies.

We begin in the next section by putting forward a conceptual framework for analysing the constitution-making process according to a number of dimensions. In the third section we undertake a closer examination of the constitutional convention method and its operational procedures with the aid of some celebrated historical cases. In the fourth section we present the results of a comparative analysis of over 100 cases according to a two-dimensional model. This then sets the scene for a closer look at the case of Cyprus in fifth section. By way of conclusion we offer some speculations on the feasibility of a constitutional convention for Cyprus.

Constitution-making: a framework of analysis

Constitutions are a complex piece of machinery that prescribe a political order and establish the basic rules of institutional engagement. The constitution-making

[1]The proposal for a constitutional convention for Cyprus is put forward in Andreas Auer, 'On the way to a constitutional convention for Cyprus', in Andreas Auer and Vasiliki Triga (eds), *A Constitutional Convention for Cyprus*, Wissenschaftlicher Verlag, Berlin, 2008, pp. 13–26.

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process is therefore a highly salient political event. Although the constitution-making process is sometimes dominated by a single individual (e.g. Solon and the Athenian polis or De Gaulle and the French Fifth Republic), it is frequently the result of a specific political bargain between disparate and competing elites.[2] Such political bargains are especially prevalent in the case of federal constitutions. In his seminal contribution to the analysis of federalism, William Riker identified three theoretically salient features of federal arrangements: their origins, operation and significance.[3] Although his approach was specifically concerned with federal arrangements, it still offers a useful template for understanding the constitution-making process. Applied to our specific analytical interest in the constitution-making process we can distinguish between: (1) *origins*, meaning the specific contextual and background factors that gave birth to a given constitution-making exercise; (2) *operation*, which relates to the specific method and procedures adopted for elaborating a constitutional package; and (3) the *significance* of the adoption (or non-adoption) of a particular constitutional package.[4]

Riker had much to say about these three dimensions and is particularly famous for postulating a generalization for the first dimension. What was it that propelled rational political elites to come together and seek federation in the first place? Riker's answer to this conundrum was devastatingly simple. A military threat. Only such a threat or crisis could compel ordinarily self-interested political elites representing diverse territorial units and/or ethnic and religious constituencies to give up power and form a federation. Recent scholarship has relaxed the military threat assumption to argue that an economic crisis or cultural threat may be functionally equivalent to the military threat.[5] In terms of the origins of a constitutional bargain, a crisis, whether real or perceived, has historically provided a powerful stimulus for antagonistic and competing political elites to seek accommodation in a variety of power-sharing arrangements that appear relevant to the case of Cyprus.[6] The same is true for many of the constitutional moments that are the subject of this paper. In short, the link between crisis and constitution-making is rather robust.[7] Many of the constitution-making processes we survey occurred in the context of revolutionary or traumatic events such as civil war, the creation of a new federation

[2]Jon Elster, 'The optimal design of a constituent assembly', conference paper presented at Colloquium on Collective Wisdom, Collège de France, 22–23 May 2008, available at <http://telechargeu.cines.fr/3517/load/documents//cerimes/UPL55488_Elster.pdf>.

[3]William H. Riker, *Federalism: Origin, Operation, Significance*, Little Brown, Boston, 1964.

[4]It should be noted that for Riker dimensions 2 and 3 had a different meaning to that which is used in our understanding.

[5]David McKay, 'William Riker on federalism: sometimes wrong but more right than anyone else?', *Regional & Federal Studies*, 14, 2004, pp. 167–186; Mikhail Filippov, 'Riker and federalism', *Constitutional Political Economy*, 16, 2005, pp. 93–111.

[6]Riker's insight, accordingly modified, is certainly pertinent to the case of Cyprus. At the perceptual level the security threat, both military (for the Greek Cypriot community) and economic (for the Turkish Cypriot community), is certainly present although it affects each community inversely. If true, then one could speculate that the economic turbulence that has followed the financial crisis sparked in 2008 may put further pressure on the Turkish Cypriot community to seek a negotiated solution. On the other hand, the integration of the Republic of Cyprus (ROC) into the European Union, and the fact that it is a full member state of the latter, may have diminished the salience of the security threat.

[7]Jon Elster, 'Forces and mechanisms in the constitution-making process', *Duke Law Journal*, 45, 1995, pp. 364–396.

as a result of independence from a colonial government, or as a result of a severe constitutional impasse. Our primary focus, however, is not to explain the *origins* of such foundational constitutional transformations. Neither will we explicitly focus on the *significance* of the constitution-making process by looking at success and failures, though we acknowledge the importance of this dimension.[8] Instead, in our analysis we shall focus on certain procedural aspects of the constitution-making process while remaining agnostic as to the form or substance of a given constitutional package. Thus, our focus is on the second dimension, namely, the *operation* dimension, which is understood as the specific mechanisms used during the constitution-making process. Are there any common operational procedures underlying the constitution-making process? And if so, can these shed further analytical light on the operation of constitutional conventions? Furthermore, can any of these findings be used to elucidate the dynamics involved in the case of Cyprus?

Before addressing some of the above questions it will be necessary to further specify the type of constitutional events we are analysing. The constitution-making process can usually be considered as a political event of the first order—though not all constitutional moments are necessarily first-order political events. In fact, the notion of a 'first-order' constitutional event can be usefully contrasted with what we shall refer to as a 'second-order' constitutional event. The distinction between 'first order' and 'second order' is usually applied to electoral events.[9] The former applies to the politically more salient national elections, whereas second-order electoral events is used in reference to politically less salient local elections. With regard to specific constitutional moments, clearly there is a difference between a foundational constitutional act and a minor constitutional revision—especially in terms of their politicization. In many cases a foundational constitutional act can also sometimes serve a *constitutive* function by acting as a vehicle for forging a common political identity and defining the demos—this was the case in India and Pakistan in the late 1940s.[10] This is hardly the case for constitutional revisions of a second order. However, a constitutional event may be of the first order even when it is not foundational in the aforementioned sense. Non-foundational constitutional events can also produce significant effects such as regime change or profound constitutional transformations. This would be the case of Spain in 1978 or South Africa in 1996, which were not foundational in terms of founding a new state but were nonetheless transformational constitutional moments. Olsen has referred to these second-order constitutional events that involve minor constitutional revisions as 'constitutional gardening', since it implies a kind of constitutional tidying-up.[11] Evidently, a grey area between first-

[8]In connection with this point we should underlie the fact that failure is very common. Indeed, in the case of federations most actually end in failure; see Alfred C. Stepan, 'Federalism and democracy: beyond the U.S. model', *Journal of Democracy*, 10, 1999, pp. 19–34 and Jonathan Lemco, *Political Stability in Federal Governments*, Praeger, New York, 1991.

[9]Karl-Heinz Reif and Hermann Schmitt, 'Nine second-order national elections—a conceptual framework for the analysis of European election results', *European Journal of Political Research*, 8, 1980, pp. 3–44.

[10]Sujit Choudhry, 'Bridging comparative politics and comparative constitutional law: constitutional design in divided societies', in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford University Press, Oxford and New York, 2008, pp. 3–40.

[11]Johan P. Olsen, 'Coping with conflict at constitutional moments', *Industrial and Corporate Change*,

order and second-order constitutional moments exists. The distinction is merely drawn at this stage to emphasize that the analytical focus of this paper is on what we call 'first-order' constitutional moments.

To summarize then, our concern in this paper is with first-order constitutional moments that typically involve a Rikerian type of 'political bargain'. Mostly these are foundational acts or attempts to introduce significant constitutional transformation within a polity. These constitutional moments usually occur in the context of real or perceived crises and can produce or accompany regime change. Because it is the basic rule of the game that is at stake, such events tend to be highly politicized. They are, in other words, political events that seek to transform a polity. In many cases these constitutional bargains not only establish the *regulative* rules that define the institutional setting but may also serve a *constitutive* function. This is especially the case in divided societies where the constitution is often the principal vehicle for forging a common political identity through the very process of debating and negotiating a constitution.[12] For the analyst, this implies focusing on the key political actors involved, the specific mandates or constraints they face, as well as the process by which acquiescence is achieved on the final constitutional package. In this connection the following three operational dimensions can be identified:

(1) *Mode of representation*. Since universal participation is in most cases impracticable, representation procedures have to be established in order to select the type of political actor entrusted with negotiating a potential constitutional redesign. There are two basic extremes on this pole. Leaders of social groups (e.g. ethnic, religious) or territorial groups (e.g. state, regional) may appoint themselves as the principal interlocutors in the process. Alternatively, the citizens or a given constituency may select their representatives in a specially convened election.
(2) *Mode of communicative interaction*. In recent political theory scholars have begun to attach great importance to the ways in which communicative interaction takes place, especially in the public sphere setting. At the risk of gross simplification much of the focus is on how distinct modes of debating, especially in settings that secure the exposition of a plurality of viewpoints, can produce more enlightened reasoning. During constitutional or foundational moments it is possible to distinguish a continuum between a 'bargaining' and a 'deliberative' communicative setting. In the former, the closed bargaining setting induces a style of personalized negotiation and potential horse-trading (e.g. I cannot sell x to my constituency unless you compromise on issue y). In a more public and open deliberative setting, political argumentation is constrained by the need to argue (rather than bargain) in terms of the common good and in a more impartial and disinterested style.
(3) *Mode of legitimation*. Modern notions of popular sovereignty and its concomitant democratic creed attribute an increasing importance to citizen participation. Applied to the constitution-making process, it favours the

Footnote 11 continued
12, 2003, pp. 815–842. Olsen also identifies a further type of constitutional transformation which is 'evolutionary' in nature. Though he does not mention it, an example of this more organic form of constitutional transformation is the Supreme Court's jurisprudence in the USA.

[12]Sujit Choudhry, op. cit.

popular legitimacy that comes from allowing citizens the opportunity to approve their own constitution. In this final stage, therefore, it is also possible to identify a pole of legitimation: one where the final product of a constitution-making process is ratified by political elites (e.g. the state executives themselves) and an alternative ratification mechanism involving a popular vote.

Constitutional conventions: a historical excursus

We have argued thus far that constitution-making processes can be characterized by a continuum between various modes of representation (political leaders versus elected assembly), types of communicative interaction (bargaining versus deliberative settings) and legitimation procedures (ratification by state executive versus popular vote). As with most social science concepts, these categories are not fixed and a blurred area exists between them. Armed with this preliminary conceptual framework we are now in a position to take a closer look at a relatively common method for founding a new political order, a constitutional convention. History offers numerous examples with the Magna Carta—at least in the Anglo-Saxon speaking world—sometimes credited as being one of the first. In this section we shall attempt to unpick the concept of a constitutional convention by using some historical cases to focus on its various operational features.

Let us start with the specific task of a constitutional convention. This is probably the easiest point to agree upon since a constitutional convention's primary task is that of proposing or drafting a constitution. Whilst this may be the case normatively, history offers a number of cases where this primary task has been abandoned for other tasks, such as legislating. Sometimes the constitution drafting and legislative task have been fused right from the start. This already alerts us to some potentially important dualities. When we examine specific operational procedures, such as how participants are selected, under what conditions and with which type of mandate, to name but a few procedures, the range of differentiation increases. With regard to the type of mandate, for instance, participants are mandated with the task of considering a new constitutional package. However, this task can range from a piecemeal reform to the implementation of a new constitutional regime. Furthermore, a specific mandate for piecemeal reform can be bypassed and lead to a constitutional transformation of the first order as in the case of the USA in 1789. This suggests a certain elasticity of the concept of a constitutional convention. The problem is not just in terms of blurred operational procedures but also connected to terminology. The terms constitutional convention, constitutional assembly, constitutional conference, constituent assembly, constitutional commission, constitutional council, tend to be all used loosely and interchangeably, oftentimes referring to similar phenomena. Translation between languages does not help (in Spanish and French the tendency is to refer to constituent assembly). In short, there is to our knowledge no accepted scholarly taxonomy that offers precise operational definitions for each of these terms.[13] In this paper we shall not

[13]A notable attempt is in Patrick Farfad and Daniel R. Reid, *Constituent Assemblies: A Comparative Survey*, Queen's University, Kingston, 1991.

seek to offer a taxonomy for the different types of constitutional conventions and therefore accept the fuzzy nature of the concept.

To examine the range of variance in the concept of a constitutional convention let us begin with two historically well-known cases, the Philadelphia Convention and the French Revolutionary Assemblies. Both the Philadelphia Convention of 1787 and the French Revolutionary Assemblies (Constituent Assembly of 1789–91 and the National Convention of 1792–95) occurred at roughly the same time and ushered in constitutional transformations of the first order. In terms of their origins, both experiences occurred at a time of deep conflict, though the French case took place in the midst of revolution and external war. Thus, from a comparative perspective the delegates' meeting in post-revolution America worked under less pressure and in a less hostile environment[14] than the French Assemblée Constituante, under the threatening menace of the Parisian mob.[15] The significance of the constitutional packages (various constitutions in the case of revolutionary France) also differed considerably. While the convention in Philadelphia gave birth to the most durable and arguably the most successful constitution of the modern era, the French context produced an unstable constitutional order that fuelled the reign of terror and the ascendancy of Napoleon. Our analytical concern, however, is initially with the operational procedures of these two historic 18th-century experiences rather than the contextual origins. Let us now focus on the three operational dimensions that we identified above.

In terms of the mode of representation the two cases differed. One immediate difference is that in the US case the delegates were sent to the convention by the states with a mandate to reform the Articles of Confederation rather than draw up a new constitutional order. From the citizens' perspective, the delegates were indirectly elected or appointed by the states' representative institutions (legislature and/or executive). It was not the state leaders who negotiated the new constitutional package but rather the indirectly appointed delegates. In France's first constituent assembly, the delegates represented functional interests (i.e. the three estates) rather than territorial interests. In terms of the mode of representation the most interesting case is France's second experience with a convention type body. In the midst of social turmoil and imminent civil war, the National Convention of 1792–95 was directly elected by the people and entrusted with drawing up a new constitutional settlement. It was, in this regard, France's first election by universal male suffrage. In contrast to 1789, the delegates considered themselves representatives of the nation of France rather than a particular territorial or functional constituency.

It appears that the mode of representation had a direct effect on the second dimension, what we refer to as the mode of communicative interaction. In the French cases, the proceedings, which involved at times more than a thousand delegates, were open and under the glare of publicity, whereas in Philadelphia

[14]Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787*, Agathon Press, New York, 1988; Catherine Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787*, Little Brown, Boston, 1966.

[15]Jim Mitchell, *The French Legislative Assembly*, Brill, Leiden, 1988; Michael P. Fitzsimmons, *The Remaking of France: The National Assembly and the Constitution of 1791*, Cambridge University Press, Cambridge, 1994.

the debates took place behind closed doors and were kept secret. Elster[16] has convincingly argued that these distinct settings produced diverging modes of debating: speakers in France argued in terms of the common good and lofty philosophical ideals while their American counterparts bargained from positions of self-interest. The outcome, according to Elster, was a false and unstable consensus in France and a viable negotiated compromise in the USA. Yet these two cases cannot constitute a 'recipe' since, as we will see below, other countries followed similar processes with the inverse end-results.

Our last dimension is that of legitimation. How is a constitutional package to be ratified and adopted? In the USA, the ratification procedure was approved by the institutional organs of the states' (legislatures and state conventions). There was one exception in which the legitimacy of a popular vote was sought however. Intriguingly, it was precisely in the case of Rhode Island where the US constitution was rejected by a referendum. In France the constituent assembly had discussed whether to ratify by popular vote but in the end the constitution was submitted to the king in 1791, who accepted it. Two years later the National Convention, whose first act was to abolish the monarchy, produced France's first republican constitution of 1793. In the midst of the reign of terror the constitution was ratified by a popular vote. However, despite being ratified, France's first historic republican constitution was eventually never applied.

The two historical cases present notable variation in terms of distinct operational procedures of a convention that can serve as archetypes for distinguishing among constitutional conventions. It should be noted that the French assemblies also morphed into legislative and executive organs, though the context of civil strife and war helps to explain such dynamics. From a normative perspective, the French revolutionary assemblies come closest to a 'pure' regime in terms of democratic criteria such as direct election, open and deliberative discussion, as well as democratic legitimation through popular vote. Incidentally, they combined three features of modern democratic theory that are emphasized to varying degrees by competing representative, deliberative and participatory models of democracy. The US constitutional convention method, a decidedly more pragmatic and negotiated compromise, has been readily emulated. Most notably this occurred in the case of Switzerland in the aftermath of a civil war in which losers and victors came together to found the Swiss Constitution of 1848. Not only did the operational procedures resemble the US case (i.e. cantonal delegates representing territorial interests and differentiated ratification by cantonal institutions with popular votes in some cases) but so too did the eventual constitutional product, a separation of powers federal system. The Swiss constitutional scholar, Kölz,[17] perceptively noted that while neighbouring constitutional assemblies in France and Prussia were deliberating lofty philosophical ideals that would give rise to the Second French Republic of 1848 and the Prussian Constitution of 1848, the Swiss delegates eschewed abstract theorization in favour of pragmatism. The constitutional bargain struck in 1848 that gave birth to the modern Swiss Confederation offers another

[16]Jon Elster, 'Arguing and bargaining in two constituent assemblies', *University of Pennsylvania Journal of Constitutional Law*, 2, 1999, p. 345.

[17]Alfred Kölz, *Le origini della costituzione svizzera*, Armando Dado Editore, Locarno, 1999.

example of a robust constitutional settlement that brought an end to a period of civil unrest and social conflict.

Comparative analysis

Our historical examples have highlighted similarities and differences among the operational procedures of various models of constitutional conventions as a specific method of constitutional transformation. In this section we present a simplified model for examining a wider range of cases before returning to the concept of a constitutional convention and its explicit application to the Cyprus context. Thus far the analysis has identified three salient operational features of a constitution-making process, the mode of representation, the mode of communicative interaction and the mode of legitimation. These dimensions overlap and interact in manifold ways. Here we will attempt to simplify the model by collapsing what we have referred to as the mode of communicative interaction to reveal a 2 × 2 matrix shown in Figure 1.

This may be seen as a rather odd omission given our previous discussion of the historical cases where it was suggested that the communicative mode of interaction, deliberative versus bargaining, was decisive in achieving negotiated compromise. We still believe this to be the case. However, for analytical purposes the mode of communicative interaction tends to dovetail the mode of representation. As a matter of generalization the further one moves left along the *x* axis, in other words closer to elite (self) appointment, the more likely a bargaining style of interaction will dominate. Where delegates are elected

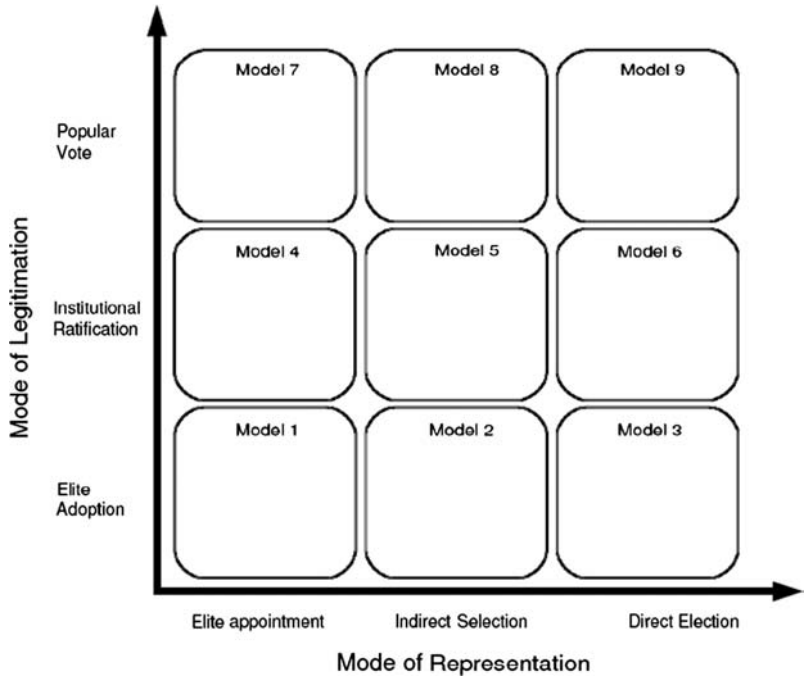

Figure 1. Two operational dimensions.

(especially in relatively large numbers) the conditions for deliberative style of debating appear to be more favourable. We believe that the simplification allows us to provide for a wider snapshot of a range of global experiences without becoming unduly complicated. To compensate we distinguish between three possible values on each axis. In terms of the various modes of representation, the cases we analyse are coded as: 1 = election; 0.5 = indirect selection; 0 = elite (self) appointment. On the mode of legitimation axis we have coded the cases we analyse in the following way: 1 = popular vote; 0.5 = institutional ratification; and 0 = elite ratification. This system of classification reveals nine possible models of first-order constitution-making as shown in Figure 1. Note that we are here mostly concerned with what we have referred to as the operational procedures of a constitution-making process.

The cases selected cannot be said to be fully representative, in other words, we have not analysed all instances of constitution-making cases which would amount to at least several hundred historical cases. Instead, we strived for a degree of geographic representation covering all the continents and selecting some of the most prominent cases thereof. We present some preliminary findings for 104 cases for which data has been collected that is part of an ongoing research project.[18] In addition, all cases marked by a double asterisk in Figure 2 are specific cases of conflict resolution. What does our snapshot survey reveal? Because of word constraints, we shall not be able to analyse in detail the cases we have coded.[19] Instead, we shall pick out some salient examples for illustrating some of the dynamics involved which could be relevant to the case of Cyprus. The simplest way to accomplish this is by focusing on the three columns. This enables us to begin by distinguishing the area that does not belong to conventions broadly understood. This can be seen by examining the first column of the matrix (which includes models 1, 4 and 7). The examples noted here have specifically not made recourse to any variant of a constitutional convention. This type of constitution-making process is therefore characterized by elite negotiation among executive leaders of territorial/functional or partisan groups and is relatively common as in some of the conflict resolution cases of model 1. Legitimation is often sought through institutional bodies such as the legislature and, in certain cases, by popular vote. In many foundational or conflict resolution instances, the constitutional package does not even require any further formal ratification apart from elite acquiescence (e.g. model 1). Thus, a feature of this column is that the need to represent the populace appears to be less important than the perceived need for elite bargaining. Many of the cases have also had a history of violent conflict and/or civil war, or abrupt regime change. Many are divided societies such as Cyprus. What is interesting, and more relevant to the Cyprus case, are some of the examples of movement along the *y* axis, that is, the mode of legitimation. We can illustrate this by looking at two cases, first how Northern Ireland has achieved a recent institutional equilibrium and, second, the dynamics around Canada's constitutional odyssey over the last decades. Both

[18]Research project with the title: 'Constitutional Conventions, Direct Democracy and Institutional Change' [100015–120040] funded by the Swiss National Science Foundation.

[19]We plan to publish a more detailed qualitative and quantitative analysis of our ongoing research on comparative constitution-making in a separate monograph.

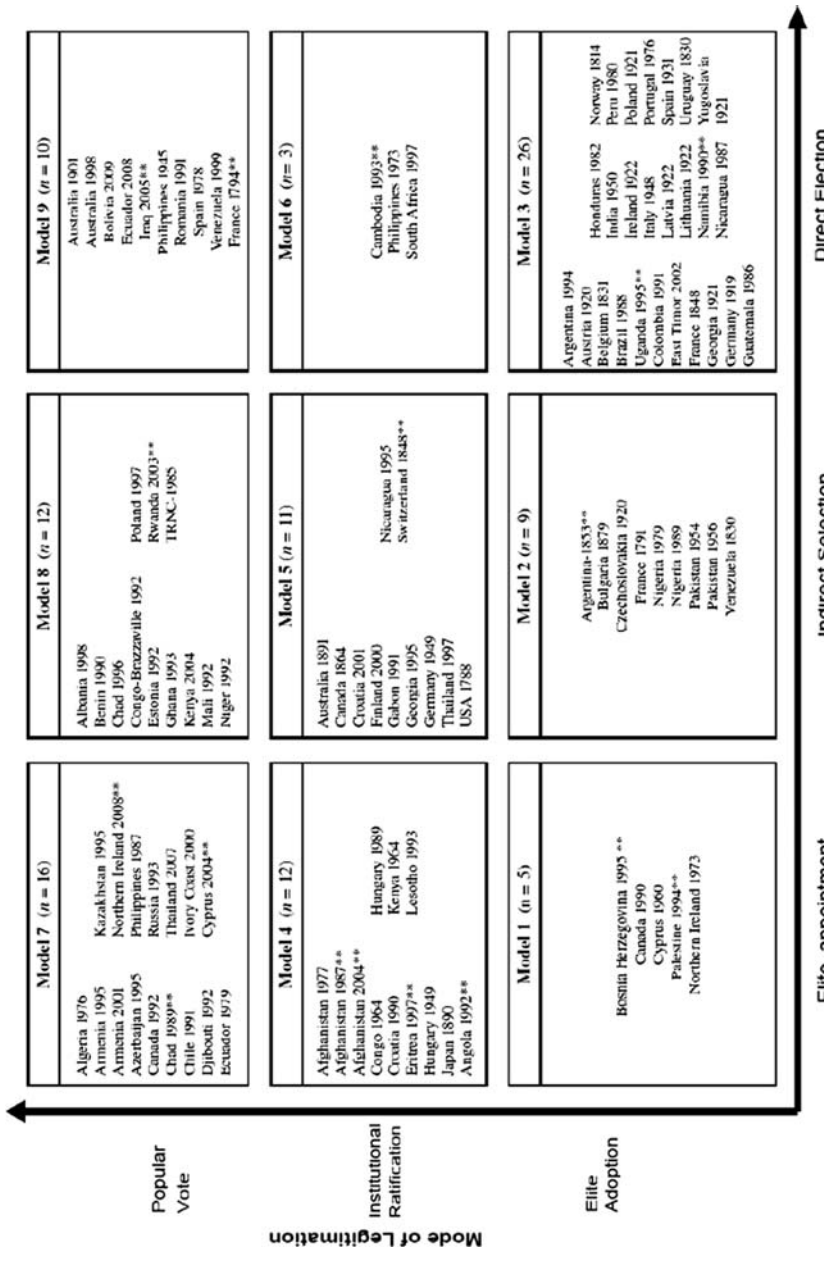

Figure 2. Comparative findings.

cases offer examples of divided societies and even though in the Canadian case the conflict has not been violent, it is a first-order constitutional problem.

Both Northern Ireland and Canada have experimented with a variety of legitimation mechanisms along the *y* axis and, in many respects, also exhibit features of bi-communal conflict. As noted by one of the foremost scholars of comparative federalism, bi-communal type conflicts—where issues more easily acquire an all or nothing type logic—seem to be far harder to resolve than multiple-group conflicts.[20] This is a problem not limited to some of the classic contemporary conflict cases such as Cyprus, Israel, Northern Ireland or Sri Lanka, but can also be seen in federal systems such as present-day Canada or Belgium. In such cases, power-sharing arrangements such as consociationalism have been commonly proposed for conflict resolution as was indeed the case for Cyprus. Consociationalism[21] was the institutional arrangement advocated in Northern Ireland—first in the elite bargain known as the Sunningdale Agreement of 1973. Support for the agreement collapsed after a few months,[22] however, and it was not until 1998 that a new constitutional bargain was negotiated. The Good Friday Agreement of 1998, which has resulted in an institutional equilibrium of sorts, had many similarities to the earlier agreement both in terms of the process and the consociational package agreed. It was negotiated by political elites representing the British and Irish premiers and involved agreement with all the major political parties of Northern Ireland. While the method of bargaining represented continuity, the mode of legitimation differed (i.e. an upward shift along the *y* axis). Multiple referendums were convoked on the same day in Northern Ireland and the Republic of Ireland and were accepted in both territories.

Canada offers another example of experimentation with various constitution-making methods (models 5, 1 and 7 in chronological order). Its most recent attempts have revolved around trying to bring Quebec into the constitutional order. Constitutional negotiations involve a particular style of bargaining among peak elites, provincial leaders and federal prime ministers, who typically agree on a constitutional package which then requires institutional ratification. This was the case for the constitutional negotiations that led to the Meech Lake Accords of 1987.[23] By 1990 this elite-driven exercise (model 1) failed the institutional ratification hurdle since many of the provincial legislatures did not ratify within the three-year limit. Two years later, in 1992, a second elite-driven package was similarly negotiated privately among federal and provincial premiers. This time, however, a new mode of legitimation was used.[24] Although

[20]Daniel Judah Elazar, *The American Constitutional Tradition*, University of Nebraska Press, Lincoln, 1988.

[21]Commonly taken to possess four operational features: executive power-sharing; high degree of self-government; proportionality; and veto-rights.

[22]It is important to note that a 'Border Poll' was held shortly after the Northern Ireland agreements of 1973. According to some analysts this 'futile border poll' is hardly comparable to the two referendums that were held after the 1998 agreements, see Jonathan Tonge, 'From Sunningdale to the Good Friday Agreement: creating devolved government in Northern Ireland', *Contemporary British History*, 14, 2000, pp. 39–60.

[23]Michael B. Stein, 'Improving the process of constitutional reform in Canada: lessons from the Meech Lake and Charlottetown constitutional rounds', *Canadian Journal of Political Science*, 30, 1997, pp. 307–338.

[24]Wayne Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*, Oxford University Press, Oxford, 2006.

still involving an elite bargain, the 1992 Charlottetown constitutional package sought popular legitimation through a referendum (model 7). This time Canada's latest attempt at constitutional overhaul failed the popular ratification hurdle with most provinces, including Quebec, rejecting the constitutional compromise. As in the case of Cyprus, elite-driven constitutional bargains can frequently fail the referendum test.

The first column in the matrix is most relevant for the Cyprus case and will be discussed further in the following section. We now turn to the remaining two columns. Our argument is that all the boxes in columns two and three are examples of conventions broadly understood. Let us begin with the second column (which includes models 2, 5 and 8). One of the classic archetypes is the US convention. As discussed in the previous section, the convention was indirectly selected and ratification of the constitutional package was achieved by the institutional organs of the constituent units of the new US federation. This method has been quite common, and has been used in cases such as Switzerland in the 1840s and many more in the 20th century. African cases are well represented in this column. Indeed, it is possible to identify an African model, frequently referred to as a constitutional conference, which involves a large body of representatives (sometimes up to a thousand or more). In some instances the process described in this column also fails at the popular ratification hurdle, as was the case in Kenya in 2004. It also occurred with Australia's first constitutional convention in 1891. What is curious about the Australian case is that in its second constitutional convention the operational procedures were altered. This time elites opted for a directly elected assembly instead of an indirectly elected one as in 1891 (i.e. a shift along the mode of representation axis) while retaining the popular legitimation device of the referendum. The approval through popular vote gave birth to the modern Australian Federal Constitution which took effect in 1901.

The Australian case brings us neatly to the third column (which includes models 3, 6 and 9) along the mode of representation axis. These are cases of directly elected constitutional conventions, usually referred to as constituent assemblies. What has surprised us in the sample of cases we have analysed is the relative frequency of this method of first-order constitution-making. Furthermore, it appears that there is a trade-off, which can be seen by the high number of cases in model 3 and model 9 in relation to model 6 of our sample. Either the input legitimacy derived from directly electing the assembly is sufficient to allow the elected body itself to ratify the constitution (model 3) or additional output legitimacy is sought by popular ratification (model 9). There were relatively few intermediate cases, that is, those that sought institutional ratification. In the widely admired recent 'textbook' case of South Africa, the legitimation of a separate institutional body was required. The constitution was institutionally ratified, by both the Supreme Court and the legislature in which a two-thirds majority was required. Interestingly, in the absence of a supermajority, a referendum would have been triggered. Had this been the case, then South Africa would have moved upwards into model 9. In many respects, model 9 offers the 'purest' example of a constitutional convention. The French national convention is an archetype that was illustrated in the third section. Nonetheless, variants of it have been used to successfully implement Australia's foundational constitutional text, and the model has also been

imposed by external actors as in the case of Iraq in 2005. Indeed, the model appears to be common in Latin America. Here there is a potential Latin model which might include the most recent Spanish case in 1978 and a series of Chavez-inspired cases (first in Venezuela and subsequently followed in relatively close succession by Ecuador and Bolivia).

We shall conclude this section with the observation that, when it comes to first-order constitutional moments, our snapshot survey reveals a veritable multiplicity of commonly used operational procedures. Interestingly, we have also found conflict resolution cases in all models. We shall investigate the implications of the various models for the case of Cyprus in the section below.

Cyprus: a new look

The matrix allows us to have a fresh look at the case of Cyprus and visualize the evolution of its constitutional dynamics. As with many of the cases we have surveyed, Cyprus' foundational constitutional act occurred in the context of independence from the British. Historically, this has produced some of the world's most robust and successful federations. However, more often than not, the British legacy has frequently been a negative one. Cyprus is definitely an example of the negative type. The foundational constitutional act of Cyprus in 1960 proved to be an unstable compromise. This is not uncommon with many of

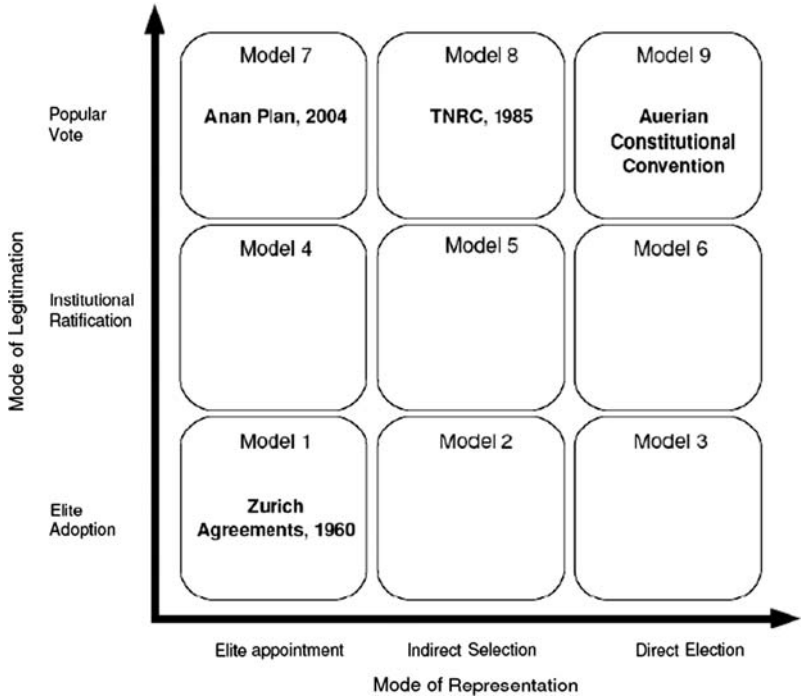

Figure 3. The case of Cyprus.

our examples suggesting that foundational constitutional moments do not always generate an institutional equilibrium and have to be re-negotiated. Tensions can frequently flare up, generate social strife and even result in military conflict, as in the case of Cyprus. Nevertheless, our focus in looking at Cyprus is not so much on the outcomes and the final product of a given foundational act or constitutional moment, but rather on its specific procedures. Figure 3 applies the conceptual framework of the previous section to the case of Cyprus.

According to our conceptual schema, the 1960 Constitution of Cyprus was the result of an elite agreement. It was elite-driven both in terms of representation and in the way it was adopted. Additionally, for the Greek Cypriot side in particular, the constitutional settlement was perceived as externally imposed. Our survey has revealed many imposed settlements in conflict cases such as Bosnia and Iraq in Figure 2. In Cyprus the settlement did not last very long and broke down within five years. Forty years after the breakdown of Cyprus' foundational constitutional act in 1964, the most recent attempt to reconstitute the Cypriot constitutional order took place in 2004. The 40-year period was interspersed, amongst other things, with inter-communal violence, an attempted coup, foreign military intervention and a de facto separation of the two communities. The most recent constitutional package, the Annan Plan of 2004, was the result of many rounds of internationally brokered negotiations and built upon many previous failures at achieving a negotiated compromise. In certain respects, there were many similarities between the process of 1960 and the constitutional package of 2004. Most obviously, both processes were elite affairs that were negotiated behind closed doors, a method that is not uncommon in conflict resolution cases. In addition, a dominant role was played by external actors in both processes: the guarantor powers in 1960 and the UN in 2004 (in collaboration with the guarantor powers). However, in the negotiations leading up to 2004, it is manifestly the case that the respective leaders of the Greek Cypriot and Turkish Cypriot communities played a much more significant role, while the UN can be considered as a more credible neutral broker than the guarantor powers during the previous foundational constitutional moment. Nonetheless, in terms of the mode of representation there was no change between 1960 and 2004. There was one crucial shift with regard to the mode of legitimation however. Here we witness an important shift along the y axis towards a model that requires the popular legitimation of a referendum. The latter took place on the same day on both sides of the divided island but was rejected by the Greek Cypriot community.

This type of upward shift (along the y axis) has been documented in our comparative analysis of other bi-communal conflict. For instance, the referendum device was used to achieve a constitutional equilibrium in the case of Northern Ireland six years before the Annan Plan referendum. The former was also held on the same day in both the Republic of Ireland and Northern Ireland. No doubt the apparent success of the Northern Ireland case had an influence on the choice of ratification mechanism for Cyprus. The referendum climate was certainly propitious given the wave of referendums that had been held during the EU's Eastern Enlargement of 2004, which also included the Republic of Cyprus. However, unlike Northern Ireland, where some analysts talk of benign external intervention, the role of external actors in Cyprus has been perceived negatively,

in particular by the Greek Cypriots, and is widely cited as one of the reasons for rejection by the latter community.[25] We come back to this point below. Another case—with certain bi-communal features—where similar upward movement along the *y* axis has taken place, is in Canada. Although the context is evidently very different, the political and constitutional impasse is nevertheless highly salient. Canada's recent constitutional odyssey is characterized by bargains hammered out behind closed doors by territorial elites, which have then failed the institutional ratification procedure and, most recently, legitimation by popular vote. In Canada there is certain disillusionment with its political culture of executive federalism for constitution-making (bargaining among territorial leaders). If the Cypriots were to settle on a new (con)federal arrangement, it would surely have a strong executive component not unlike the Canadian case. Factors related to the political culture in Cyprus are important in this connection. Historically, both communities could be said to possess features of 'delegative democracy' a model usually applied to Latin America cases.[26] This model is characterized by highly competitive elections, but once elected the President enjoys considerable freedom from constraints.

In short, it appears that movement along the *y* axis (mode of legitimation) is easier to achieve than along the *x* axis (mode of representation) in Cyprus and this has been demonstrated by the most recent experience. Let us examine the implications of what a move along the mode of representation axis would entail. We have already mentioned the tendency for difficult conflict resolution cases to be negotiated by elite bargains, though our survey reveals much variance. We have also suggested political culture and a tendency towards delegative democracy may also play a role in the case of Cyprus. Under what conditions could a rightward shift along the *x* axis occur? The simplest explanation is ultimately one that is based on the incentives facing political elites. Why should political elites give up their ability to shape a foundational constitutional arrangement that will determine the eventual rules of the game to a body that may ultimately escape their control? Ordinarily, elites would need to be under an extraordinary compulsion to give up this power. Of course, it would be possible to retain control by appointing partisans and limiting the mandate of a constitution drafting body. This has been the model adopted in many post-Soviet constitution-making processes. Nonetheless, there are moments of impasse where a rightward shift has occurred—even in difficult cases. Let us assume, then, that in the case of Cyprus there could be rightward shift along the *x* axis. What form would it take? Although the matrix reveals a range of basic models, some could be considered more likely than others. Why should this be so? Our simple argument is that history matters and can have potential lock-in effects. We believe it would be difficult for any future Cypriot constitutional package to bypass the popular legitimation hurdle. The need for the legitimation mechanism of a referendum for a foundational sovereign and constitutional act is, therefore, a reasonable assumption to hold in the case of Cyprus. This suggests only three scenarios along the top row of the matrix, models 7, 8 and 9. Model 7 was the method used for the Annan Plan (note that we are referring to the operational

[25]Van Coufoudakis and Klearchos Kyriakides, *The Case Against the Annan Plan*, Lobby for Cyprus, London, 2004.

[26]Guillermo O'Donnell, 'Delegative democracy', *Journal of Democracy*, 7, 1994, pp. 112–126.

features of model 7 and not to any of its substantive content). We still believe this to be the most likely model pursued by political elites. Indeed, current negotiations appear to follow the elite bargaining and popular ratification model. Nonetheless, model 7 is not written in stone and a constellation of endogenous and/or exogenous factors (such as popular disillusionment with elite-based negotiations or external pressure) could precipitate political leaders to move rightward along the *x* axis. To the extent that such a shift were to occur, it would involve implementing some variant of a constitutional convention. If so, then there are only two basic models available, models 8 and 9. This brings us neatly back to the issue of a constitutional convention for Cyprus.

Let us start with model 9 which we shall refer to as the *Auerian* model of a constitutional convention for Cyprus.[27] As noted in earlier sections, from a normative democratic perspective this is the 'purest' regime in terms of the mechanisms it offers across both the representation and legitimation axes. Apart from its normative democratic foundations, the Auerian Constitutional Convention (CC) parts from the premise that the role of external powers has been detrimental to the resolution of the Cypriot problem. What better way to address the conflict, therefore, than to provide the Cypriot people with the political mechanisms for resolving their own internal dispute? Whether this is feasible or not is a separate question for the moment since the crucial analytical point is to underscore that the Auerian CC is a participatory exercise par excellence. At least two, if not more, separate referendums are envisaged. One to launch the process and one to bring it to an end for both communities. If the launching referendum is successful then a further election will be convoked to directly elect the constitution-making body. A positive spillover is that in the process of electing delegates, a national debate will be triggered. Sometimes this can, in and of itself, be a catalyst for reconciliation of antagonistic groups as appears to be the case in South Africa. In theory, the combined effect of these participatory procedures and the accompanying debates both inside and outside the convention provide favourable conditions for deliberative communicative interactions across the wider public sphere. Lastly, the popular veto point at the end of the process in the form of a referendum requiring a majority in both communities ought to stimulate a culture of compromise and negotiated settlement rather hard-nosed bargaining. This still leaves the very uncertainty of the popular vote which could derail even the most crafted and delicate compromise as the advocates of the Annan Plan were to learn. In sum, the Auerian CC manages to intriguingly reconcile three different strands in democratic theory. First, it incorporates a Schumpeterian mechanism which allows the citizens to select their delegates among a cartel of political elites; second, it offers conditions that are theoretically favourable to a Habermasian style public sphere oriented deliberative interaction; finally a Rousseauian participatory dimension ensures that the entire process is launched and ratified through mechanisms of direct citizen participation. Evidently, a shift towards the Auerian CC model would be a very bold move on the part of Cypriot elites.

What of model 8? The first thing to note is that there has actually been a constitutional convention of this type in Cyprus (see model 8 in Figure 2).

[27]Andreas Auer, op. cit.

According to Wolf,[28] a constituent assembly of 70 members was assembled from the legislature with the task of providing a constitutional framework for the 'Turkish Republic of Northern Cyprus' ('TRNC'). They convened in January 1984 and drafted a constitution, which was approved by the Constituent Assembly in March 1985. It was then submitted to a popular referendum in May 1985 and approved by 70 per cent of eligible voters, which included the new immigrant community from Turkey.[29] Hence at least one of the two communities already has a direct experience of a constituent assembly.

As to its potential as a future model it should be noted that the range of variance within model 8 is large. For our analytic purposes the key is what we have referred to as indirect selection. Should Cypriot elites decide on a rightward move along the *x* axis they could simply select a group of partisan appointees. Alternatively, the selection of the convention body could be the result of a (s)election by the respective legislatures rather than executive appointment. One could add a whole range of additional criteria such as the specific mandate of the body (wide versus narrow), its composition (technocratic versus political), its duration (long versus short) and the degree of public input (high versus low)—to name but a few. Despite this variance, from the citizens' perspective the selection of the delegates is indirect—though some procedures are obviously more 'indirect' than others. To sum up, if popular dissatisfaction with elite negotiations or a combination of internal and external pressures lead Cypriot elites to decide on a rightward move on the representation axis, then political expedience and the desire to maintain control of the process may induce them to seek some variant of the indirect selection model. Hybrid models can also be devised such as the mixed criteria used in some Colombian and Australian conventions, half-elected and half-appointed, and one can envisage various combinations thereof. The major point to underline is that movement along the *x* axis can vary from the 'pure' democratic model advocated by Auer to a model which may in practice differ only slightly from the elite bargaining represented by the Annan Plan.

Conclusions

By way of conclusion we can offer the following observations about the convention method and some speculations about its relevance to the case of Cyprus. The constitutional convention method, according to our expansive understanding, is a relatively common constitution-making method. Indeed, of the 104 cases we surveyed, it is the most popular method. Though the variation among these different cases is large, some variant of the convention method has been adopted in most first-order constitutional moments we have analysed. In addition, and perhaps rather more surprisingly, the convention method is also used during instances of conflict resolution. This occurred in roughly half of our sample of cases. Turning to Cyprus, we have shown that a variety of mechanisms have been used to date. Most recently, there has been a movement towards the output legitimacy that is conferred through a popular vote. We have argued that this move is likely to have lock-in effects such that any further constitutional

[28]James H. Wolf, 'Cyprus: federation under international safeguards', *Publius*, 18, 1988, pp. 75–89.
[29]Ibid.

package is likely to require the specific assent of the people in a referendum. Furthermore, and again somewhat surprisingly, we have observed that a constituent assembly (a variant of a convention according to our understanding) has already been used in Cyprus. This was the case in the 'TRNC' in 1984–85. In short, there is no a priori reason why the convention method would not constitute an optimal constitution-making mechanism in the case of Cyprus. On the contrary, we believe there are some very good theoretical (and especially normative) reasons in favour of some variant of the convention while the empirical analysis has identified a number of cases where it has been used—even in conflict resolution cases. A comparative institutional perspective would suggest that, if current negotiations prove ineffective, then some variant of a convention could indeed be a possible mechanism of constitutional design.

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